Winston Tham Soong Lai & Anor v CH Tai Furniture Sdn Bhd

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24–3–01 OF 2020
CHOO KAH SING J
14 AUGUST 2020

Civil Procedure — Discovery — Discovery before commencement of proceedings — Discovery of defendant's reports and financial statements, inventory list and bank statements — Whether plaintiffs stated material facts pertaining to intended proceedings — Whether plaintiffs satisfied requirement to identify defendant as likely party to court proceeding — Whether plaintiffs specified the relevant documents — Whether documents were in possession, custody and power of defendant — Whether plaintiffs' application was a fishing expedition — Rules of Court 2012 O 24 r 7A

In year 2010, vide a business proposition by the defendant, the parties had agreed that the first plaintiff's dormant company known as Silvergain Marketing Sdn Bhd ('SMSB') would be used as a vehicle company to manufacture and supply steel frames to the defendant at cost price or even below cost price. The parties agreed that any profit generated, or loss suffered by the defendant based on this business proposition would be shared equally between the parties. In 2014, the parties had a fall out and the director of the defendant's company known as Chan Ah Wa ('Chan') had asked the plaintiffs to relinquish their posts as directors and shareholders of SMSB if they wanted back their working capital and the profits generated by the defendant. The plaintiffs succumbed to Chan's request and continued assisting the defendant's business until 2016. The plaintiffs then filed the present originating summons pursuant to O 24 r 7A of the Rules of Court 2012 ('the ROC') for discovery of the following documents before commencement of a proceeding: (a) reports and financial statements for the years 2013 to 2019; (b) inventory list; and (c) bank statements for the years 2010 to 2019 of the defendant company ('the said documents'). The plaintiffs' case was that the first plaintiff had not been paid from early 2010 until the filing of the action and since they had invested in the business proposition, they ought to be entitled to know whether the defendant company had generated any profit or not. If the defendant had generated profit, then the plaintiffs would be entitled to their shares of the profit. In the event Chan had concealed the fact that the defendant made profit and did not share with the plaintiffs and other investors, the defendant or Chan could be in breach of a business-venture agreement or any other possible causes of action which could lead to a potential lawsuit. The plaintiffs submitted that the defendant's refusal to divulge the necessary information to the plaintiffs was sufficient to form the basis for the plaintiffs' application. The issue arose was

whether the plaintiffs' application was a 'fishing expedition'.

Held, allowing the plaintiffs' application in part:

(1) The plaintiffs' narrative constituted the material facts pertaining to a potential proceeding ie in the event the documents revealed that the defendant made profits for the period between 2010 and 2019, this could lead to a potential legal suit. The party or parties to the potential legal suit would likely be Chan and/or the defendant. Hence, the plaintiffs had satisfied the requirement to identify the defendant as a likely party to the intended court proceeding. In addition, the plaintiffs had through their affidavit itemised all the documents in detail for the order sought in the application. The said documents contained information and details which were relevant and sufficient for the plaintiffs to file their potential court proceeding in the event there were profits made by the defendant company that were not shared with or divulged to the plaintiffs. It was obvious that those documents sought were in the possession, custody and power of the defendant company (see paras 10–11).

(2) The facts relied on by the plaintiffs supported that this application was not 'fishing expedition'. The fact that the plaintiffs could sell their shares at the investment value inferred that the defendant could have been making profit. Further, it was the understanding between the parties that the investment in SMSB would be tied to the returns from the defendant company. This nexus was sufficient to make the defendant a potential party to the potential suit. The defendant could not resist the plaintiffs' application on the ground that the order should not be granted because its records were private and confidential as the confidentiality and privacy of the books and records of the defendant had been compromised the moment that Chan had agreed to share the defendant's profits with SMSB. In addition, the discovery would mitigate unnecessary costs and pre-empt a potential litigation in the event the books and records reveal that the defendant had indeed suffered losses during the period between 2010 and 2019 (see paras 14–18 & 20).

(3) The plaintiffs' application was necessary in the circumstances of the case, because it was only the defendant's books and records that would reveal the truth. The documents that the plaintiffs sought were material, and the documents may lead to one or many potential causes of action or could end the plaintiffs' quest. Thus far, there was no identifiable cause of action availed to the plaintiffs. However, the court was not satisfied that the plaintiffs were entitled to all the documents sought because the plaintiffs could only establish their right to the records of the defendant company for the period between 2010 and 2014. However, as it was not

in dispute that the plaintiffs continued to assist the defendant until 2016, the court permitted the plaintiffs to seek the records of the defendant until 2016 (see paras 21–24).

[Bahasa Malaysia summary

Pada tahun 2010, melalui cadangan perniagaan oleh defendan, pihak-pihak telah bersetuju bahawa syarikat tidak aktif milik plaintif pertama yang dikenali sebagai Silvergain Marketing Sdn Bhd ('SMSB') akan digunakan sebagai syarikat tunggangan untuk membuat dan membekalkan rangka besi kepada defendan pada harga kos atau bahkan di bawah harga kos. Pihak-pihak bersetuju bahawa setiap keuntungan yang dihasilkan, atau kerugian yang ditanggung oleh defendan berdasarkan cadangan perniagaan ini akan dibahagi sama rata antara pihak-pihak. Pada tahun 2014, terdapat perbalahan antara pihak-pihak dan pengarah syarikat defendan yang dikenali sebagai Chan Ah Wa ('Chan') telah meminta plaintif-plaintif untuk melepaskan jawatan mereka sebagai pengarah dan pemegang saham SMSB sekiranya mereka ingin mendapatkan semula modal kerja dan keuntungan mereka yang dihasilkan oleh defendan. Plaintif mengikuti permintaan Chan tersebut dan terus membantu perniagaan defendan hingga tahun 2016. Plaintif kemudian memfailkan saman pemula semasa berdasarkan A 24 k 7A Kaedah-Kaedah Mahkamah 2012 untuk penzahiran dokumen-dokumen berikut sebelum permulaan prosiding: (a) laporan dan penyata kewangan untuk tahun 2013 hingga 2019; (b) senarai inventori; dan (c) penyata bank untuk tahun 2010 hingga 2019 syarikat defendan ('dokumen-dokumen tersebut'). Kes plaintif-plaintif adalah bahawa plaintif pertama belum dibayar sejak dari awal tahun 2010 hingga pemfailan tindakan ini dan oleh kerana mereka telah melabur dalam cadangan perniagaan tersebut, mereka seharusnya berhak untuk mengetahui sama ada syarikat defendan telah menghasilkan keuntungan atau tidak. Sekiranya defendan telah menghasilkan keuntungan, maka plaintif-plaintif akan berhak atas bahagian keuntungan mereka. Sekiranya Chan menyembunyikan fakta bahawa defendan membuat keuntungan dan tidak berkongsi dengan plaintif-plaintif dan pelabur lain, defendan atau Chan mungkin melanggar perjanjian usaha niaga atau kemungkinan kausa-kausa tindakan lain yang boleh membawa kepada tuntutan mahkamah yang berpotensi. Plaintif berhujah bahawa keengganan defendan untuk menzahirkan maklumat yang diperlukan kepada plaintif-plaintif sudah cukup untuk menjadi asas bagi permohonan plaintif-plaintif. Isu yang timbul adalah sama ada permohonan plaintif adalah 'fishing expedition'.

Diputuskan, membenarkan sebahagian permohonan plaintif-plaintif:

(1) Naratif plaintif-plaintif merupakan fakta material yang berkaitan dengan prosiding yang berpotensi iaitu sekiranya dokumen-dokumen tersebut menunjukkan bahawa defendan memperoleh keuntungan untuk jangka

waktu antara 2010 hingga 2019, ini boleh membawa kepada tuntutan undang-undang yang berpotensi. Pihak atau pihak-pihak kepada tuntutan undang-undang yang berpotensi tersebut mungkin adalah Chan dan/atau defendan. Oleh itu, plaintif-plaintif telah memenuhi syarat untuk mengenal pasti defendan sebagai pihak yang berkemungkinan dalam prosiding mahkamah yang ingin difailkan. Di samping itu, plaintif-plaintif telah menyenaraikan dengan terperinci semua dokumen untuk perintah yang dipohon dalam permohonan ini melalui afidavit mereka. Dokumen-dokumen tersebut mengandungi maklumat dan perincian yang relevan dan cukup bagi plaintif-plaintif untuk memfailkan prosiding mahkamah yang berpotensi sekiranya terdapat keuntungan yang dibuat oleh syarikat defendan yang tidak dibahagikan atau dizahirkan kepada pihak plaintif-plaintif. Adalah jelas bahawa dokumen-dokumen yang dimohon tersebut adalah berada dalam milikan, jagaan dan kuasa syarikat defendan (lihat perenggan 10–11).

(2) Fakta yang diandalkan oleh plaintif-plaintif menyokong bahawa permohonan ini bukan 'fishing expedition'. Fakta bahawa plaintif-plaintif dapat menjual sahamnya pada nilai pelaburan menunjukkan bahawa defendan mungkin memperoleh keuntungan. Selanjutnya, adalah menjadi persefahaman antara pihak-pihak bahawa pelaburan dalam SMSB berhubung kait dengan keuntungan dari syarikat defendan. Nexus ini cukup untuk menjadikan defendan sebagai pihak yang berpotensi kepada tuntutan yang berpotensi tersebut. Defendan tidak boleh menafikan permohonan plaintif-plaintif dengan alasan bahawa perintah tersebut tidak boleh diberikan kerana rekod-rekod mereka adalah sulit dan rahsia kerana kerahsiaan buku-buku dan rekod-rekod defendan telah dikompromikan ketika Chan bersetuju untuk membahagikan keuntungan defendan dengan SMSB. Selain itu, penzahiran ini akan mengurangkan kos yang tidak perlu dan mencegah kemungkinan prosiding yang berpotensi sekiranya buku-buku dan rekod-rekod menunjukkan bahawa defendan memang mengalami kerugian dalam jangka masa antara 2010 dan 2019 (lihat perenggan 14–18 & 20).

(3) Permohonan plaintif-plaintif adalah perlu dalam keadaan kes ini, kerana hanya buku-buku dan rekod-rekod defendan yang boleh menzahirkan kebenaran. Dokumen yang dimohon oleh plaintif-plaintif adalah material, dan dokumen tersebut boleh membawa kepada satu atau banyak kemungkinan kausa tindakan atau dapat mengakhiri pencarian plaintif-plaintif. Setakat ini, tidak ada kausa tindakan yang dapat dikenal pasti bagi plaintif-plaintif. Namun, mahkamah tidak berpuas hati bahawa plaintif berhak atas semua dokumen yang dimohon kerana plaintif-plaintif hanya dapat membuktikan hak mereka terhadap rekod-rekod syarikat defendan untuk jangka waktu antara 2010 dan

2014. Namun, kerana tidak dipertikaikan bahawa plaintif-plaintif telah terus membantu defendan sehingga tahun 2016, mahkamah membenarkan plaintif-plaintif memohon rekod-rekod defendan sehingga tahun 2016 (lihat perenggan 21–24).]

Cases referred to

Bandar Utama Development Sdn Bhd & Anor v Bandar Utama 1 JMB [2018] MLJU 697; [2018] 4 MLRA 345, CA (refd)

Infoline Sdn Bhd (sued as Trustee of 'Tee Keong Family Trust') v Benjamin Lim Keong Hoe [2017] MLJU 18; [2017] 4 MLRA 203, CA (refd)

Legislation referred to

Rules of Court 2012 O 24 r 7A, 7A(3), (3)(a)

Low Tze Ken (Sharon Koh with him) (TK Low & Co) for the plaintiffs.

Henry Ngak (Tan Niam Shin and Gan Bee Hui with him) (Law Chambers of Tan) for the defendant.

Choo Kah Sing J:

INTRODUCTION

[1] This is an originating summons filed pursuant to O 24 r 7A of the Rules of Court 2012 ('the RoC') for discovery of documents before commencement of a proceeding. The documents sought by the plaintiffs are as stated in their supporting affidavit (encl 2). In essence, the plaintiffs sought for: (a) reports and financial statements for the years 2013 to 2019; (b) inventory list; and (c) bank statements for the years 2010 to 2019 of the defendant company.

[2] On 21 July 2020, this court allowed the plaintiffs' application in part, and the reasons for the decision are set out below.

SALIENT BACKGROUND FACTS

[3] In the year 2010, the first plaintiff was approached by one Chan Ah Waa ('Chan'), a director of the defendant company, to help to improve the defendant's furniture business. After much persuasion, the first plaintiff agreed to help the defendant market the defendant's business. The first plaintiff successfully procured new orders/contracts from third parties to purchase the defendant's products, ie furniture.

[4] The defendant's business has improved since the first plaintiff was involved in marketing the defendant's products. The business was so promising that a business proposition was made to the plaintiffs by the defendant to

venture into the defendant's business. The plaintiffs and the defendant together with two other individuals, namely Yee Keong Heng and Ooi Ken Choong, invested a sum of RM800,000 as working capital for the said business proposition.

[5] The business proposition or business model involved the first plaintiff using his dormant company known as 'Silvergain Marketing Sdn Bhd' ('SMSB') as a vehicle company to manufacture and supply steel frames to the defendant at cost price or even below cost price. The defendant would then sell the products to generate maximum profits. It was further agreed that the salary of the defendant's employees would be paid by SMSB. Any profit generated by the defendant company based on this business model would be shared 50:50 between the defendant and SMSB. Likewise, if there is a loss, the defendant and SMSB would bear the loss equally.

[6] Sometime in 2014, the parties had a fall out. The plaintiffs averred that they were forced and threatened by Chan to cease the manufactureand supply of the steel frames to the defendant. The plaintiffs also averred that Chan said that if the plaintiffs wanted back their investment in the working capital, and the profit generated from the defendant, the plaintiffs had to relinquish their posts as directors and shareholders of SMSB. The plaintiffs relied on the statements made by Chan and went ahead to relinquish their posts and shareholdings in SMSB. Accordingly, the plaintiffs' investment, ie RM400,000, was refunded by the defendant upon their cessation as directors and shareholders of SMSB. Thereafter, the plaintiffs continued to assist in the defendant's business until 2016.

[7] The plaintiffs, Yee Keong Heng and Ooi Ken Choong made requests to the defendant to reveal the defendant's sales and profits for the years between the date of their investment and the date of their cessation as shareholders in SMSB, but to no avail. The plaintiffs attempted for many years to obtain the information from the defendant company but to no avail. The plaintiffs had no option but to file this application.

THE FINDINGS OF THIS COURT

[8] In order to succeed in the application, it is incumbent upon the plaintiffs to satisfy the court that the requirements as stated in O 24 r 7A(3) of the RoC have been complied with sub-s (3) of r 7A states as follows:

(a) in the case of an originating summons under para (1), state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to subsequent proceedings in court; and

(b) in any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings or the identity of the likely parties to the proceedings, or both, and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.

[9] The plaintiffs relied on the following as their grounds for the application and as the material facts for the intended court proceeding, with reference to the requirement stated in r 7A(3)(a) of the RoC. It is the plaintiffs' narrative that the first plaintiff has not been paid from early 2010 until the filing of the action. The plaintiffs' grievance was that since they had invested in the business proposition proposed by Chan, they ought to be entitled to know whether the defendant company held by Chan had generated any profit or not. If the defendant had generated profit between the period 2010 and 2019, then the plaintiffs would be entitled to their shares of the profit. In the event Chan had concealed the fact that the defendant made profit and did not share with the plaintiffs and other investors, the defendant or Chan could be in breach of a business-venture agreement or any other possible causes of action which could lead to a potential law suit. The defendant's refusal to divulge the necessary information to the plaintiffs is sufficient to form the basis for the plaintiffs' application.

[10] Basically, the plaintiffs' narrative constitutes the material facts pertaining to a potential proceeding, ie in the event the documents reveal that the defendant made profits for the period between 2010 and 2019, this could lead to a potential legal suit. The party or parties to the potential legal suit would likely be Chan and/or the defendant. Hence, the plaintiffs have satisfied the requirement to identify the defendant(s) as a likely party(ies) to the intended court proceeding.

[11] With regard to the requirement as stated in r 7A(3)(b), the plaintiffs had through their affidavit (encl 2) itemised all the documents in detail for the order sought in the application. Those documents, ie reports and financial statements, inventory list and bank statements, contain information and details which are relevant and sufficient for the plaintiffs to file their potential court proceeding in the event there were profits made by the defendant company that were not shared with or divulged to the plaintiffs. It is obvious that those documents sought were and still are in the possession, custody and power of the defendant company.

[12] One of the questions that this court has to answer before granting the order is whether the plaintiffs' application could tantamount to a 'fishing expedition'? (see *Infoline Sdn Bhd (sued as Trustee of 'Tee Keong Family Trust') v Benjamin Lim Keong Hoe* [2017] MLJU 18; [2017] 4 MLRA 203 (CA); and *Bandar Utama Development Sdn Bhd & Anor v Bandar Utama 1 JMB* [2018] MLJU 697; [2018] 4 MLRA 345 (CA), as cited by parties' counsels).

[13] It is not disputed that there was a business proposition between the plaintiffs and the defendant, and that the business proposition did take-off as planned. Unfortunately, it did not last long. When the plaintiffs left the 'business-partnership', the plaintiffs were able to sell their interests to two individuals, namely Chan Hann Tong and Chin Ting Kong for a sum of RM400,000 which was the same amount the plaintiffs (and others) had invested in the 'business-partnership'. The shares in SMSB could fetch such substantial amount contradicts the defendant's narrative that the joint business investment did not do well, i.e. the defendant suffered losses. If SMSB had suffered losses, as a result of losses suffered by the defendant company, then the value of the shares in SMSB should have gone down.

[14] The fact that the plaintiffs could sell their shares at the value they invested infers that the defendant could have been making profit. SMSB would not have managed to attract new investors if it was a failed company which profit was tied to the defendant company. It was the plaintiffs' narrative that they were 'forced' to stop production in SMSB and to relinquish their posts and shareholding in SMSB. The facts relied on by the plaintiffs support that this application is not 'fishing expedition'. The plaintiffs are entitled to gather information and evidence to build their potential suit.

[15] It is not refuted that one of the terms of the business proposition was that the plaintiffs were entitled to the profits (if any) of the defendant company in the investment. Therefore, the defendant could not be said to be not involved in the business proposition. Although there was no formal contract entered into between the plaintiffs and the defendant company, it was the understanding between the plaintiffs and the defendant that the investment in SMSB would be tied to the returns from the defendant company. This nexus is sufficient to make the defendant a potential party to the potential suit.

[16] The defendant could not mount its resistance against the plaintiffs' application on the ground that the order should not be granted because its records are private and confidential.

[17] The confidentiality and privacy of the books and records of the defendant had been compromised the moment that Chan had agreed to share the defendant's profits (50:50, if any) with SMSB. It was the business

proposition offered by Chan that had led the plaintiffs to invest in the working capital in SMSB, and that gives raise to the plaintiffs' entitlement to know whether the defendant has been making a profit or not.

[18] This court is of the considered view that the plaintiffs' application would not result an untoward effect of increasing the costs of dispute or encouraging satellite litigation. Conversely, the discovery would in fact mitigate unnecessary costs and pre-empt a potential litigation in the event the books and records reveal that the defendant had indeed suffered losses during the period between 2010 and 2019.

[19] If the books and records reveal that the defendant was making profit between 2010 and 2019, the plaintiffs would have a cause of action against the defendant, and the defendant would have to answer the plaintiffs' grievances in the potential proceeding.

[20] After having considered the narratives of both parties and the law of discovery of documents before commencement of any legal proceedings, this court is satisfied that the plaintiffs' application has met the threshold of the law, and that this application is not a case of an applicant trying to annoy the defendant or seeking a 'fishing expedition'.

[21] This court views the plaintiffs' application as necessary in the circumstances of the case, because it is only the defendant's books and records that would reveal the truth. The plaintiffs have been kept in the dark for years after venturing into the business proposition with the defendant.

[22] The documents that the plaintiffs sought are material, and the documents may lead to one or many potential causes of action or could end the plaintiffs' quest. Thus far, there is no identifiable cause of action availed to the plaintiffs. This court could not agree with the defendant's counsel's submission that the plaintiffs could at this juncture identify their cause of action against the defendant.

[23] However, this court is not satisfied that the plaintiffs are entitled to all the documents sought. In so far the plaintiffs' narratives are concerned, the plaintiffs could only establish their right to the records of the defendant company from the period they ventured into the business proposition from the period between 2010 and 2014.

[24] However, as it is not in dispute that the plaintiffs continued to assist the defendant until 2016, this court would, therefore, permit the plaintiffs to seek the records of the defendant until 2016.

A CONCLUSION

[25] Based on the reasons above, this court allowed the plaintiffs' application for the discovery of the following documents only:

B (a) reports and financial statement for the defendant company from years 2013 to 2016 (as prayed in encl 2, paras 5.1(a) to (d));

(b) list of inventories for the year ended on 31 December 2015 (as prayed in encl 2, para 5.1(h)); and

C (c) OCBC bank statements from January to December from the year 2010 to 2016 (as prayed in encl 2, paras 5.1(i) to (o)).

[26] This court noted on record that there are documents/correspondences between the parties or parties' representatives that may be marked 'without prejudice'. The defendant is not precluded from raising any issue relates to such D documents marked 'without prejudice' in the potential proceeding.

Plaintiffs' application allowed in part.

E Reported by Dzulqarnain bin Ab Fatar

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